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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Morey Parrish, Jr.,) No. CV-03-2107-PCT-LOA
10 Plaintiff,) **ORDER**
11 vs.)
12 Michael J. Astrue, Commissioner of the)
13 Social Security Administration,)
14 Defendant.)
15 _____)

16 This matter arises on Plaintiff's Motion for an Award of Attorney Fees under
17 42 U.S.C. § 406(b). (docket # 42) Defendant¹ filed a Response indicating, *inter alia*, that
18 because "[t]he Commissioner's role is limited to paying the amount the Court finds is owed by
19 Plaintiff to Plaintiff's attorney," "the Commissioner takes no position as to whether the fee
20 sought by plaintiff's attorney is reasonable." (docket # 43 at 1 - 2)

21 **BACKGROUND**

22 On August 19, 1985, Plaintiff filed an application for Title II benefits under the
23 Social Security Act (the "Act"), 42 U.S.C. § 401-433. (docket # 30 at 1) On January 30, 1987,
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25 ¹ The Court has *sua sponte* amended the caption to substitute Michael J. Astrue,
26 Commissioner of the Social Security Administration, as the Defendant in this case. On February
27 12, 2007, Michael J. Astrue became Commissioner of the Social Security Administration.
28 Pursuant to Fed. R. Civ. P. 25(d)(1) and the last sentence of 42 U.S.C. § 405(g), Michael J. Astrue is automatically substituted as the Defendant in this case.

1 an administrative law judge (“ALJ”) issued a decision, finding Plaintiff disabled as of the
2 alleged onset date and awarding disability benefits. (*Id.*) Thereafter, on July 25, 1991, the
3 Social Security Administration informed Plaintiff that he was considered no longer disabled as
4 of July 1, 1997 due to medical improvement in his condition. (*Id.* at 2) Plaintiff requested a
5 hearing before an ALJ. (*Id.*) Following a March 26, 1998 hearing, on February 19, 1999, a
6 different ALJ issued a decision finding that Plaintiff’s medical condition had improved
7 significantly and that improvement related to his ability to work. (*Id.*) Plaintiff appealed that
8 decision. On December 19, 2000, the Appeals Council granted review of the ALJ’s decision
9 and remanded to the ALJ for additional findings and a new decision. (*Id.*) The order of remand
10 directed an ALJ to further develop the record regarding Plaintiff’s mental and physical
11 impairments. On December 28, 2001, an ALJ issued a decision finding that Plaintiff suffers
12 from severe impairments of degenerative disc disease with chronic pain and a depressive
13 disorder. (*Id.*) The ALJ concluded, however, that Plaintiff has the residual functional capacity
14 to perform light work. (*Id.*) The ALJ concluded that Plaintiff’s disability ceased as of May 4,
15 1998, the date of a consultive examination performed by Robert Barker, II, M.D. (*Id.*) The
16 Appeals Council denied Plaintiff’s request for review on September 11, 2003, making the ALJ’s
17 decision the final decision of the Commissioner. (*Id.*) Plaintiff then filed a Complaint in this
18 Court on October 29, 2003, seeking judicial review of the Commissioner’s decision with the
19 assistance of attorney Alan M. Schiffman. (docket # 1)

20 The parties have previously consented to magistrate-judge jurisdiction pursuant
21 to Title 28 U.S.C. 636(c)(1) for all purposes, including trial and final entry of judgment.
22 (docket # 3 and # 6)

23 On October 6, 1997, Mr. Schiffman was retained by Plaintiff who agreed to
24 pay a contingency fee of 25% of all past-due benefits payable to him and his auxiliaries if he
25 was reinstated to benefits and received ongoing benefits. (docket # 30) The fee agreement had
26 separate provisions if only a closed period of additional disability was awarded or if an
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1 unfavorable decision was rendered. A copy of the fee agreement was provided for the Court's
2 review. (*Id.*; Exhibit ("Exh") 1)²

3 This Court granted summary judgment in favor of Plaintiff and denied
4 Defendant's motion for summary judgment on November 12, 2004. (*Id.*) The Court then
5 remanded the case to the Commissioner for a determination of benefits. (*Id.*) Later, Plaintiff
6 was informed that the sum of \$37,254.30 was withheld from retroactive benefits as a possible
7 attorney's fee. (docket # 42 at 2) This represented 25% of the past-due benefits of \$149,017.00
8 payable pursuant to the Court's judgment. Petitioner was thereafter authorized to charge an
9 attorney's fee of \$21,500.00 for time spent on Plaintiff's behalf before the Social Security
10 Administration. (*Id.*, Exh. 5) Therefore, \$15,754.30 remains available as a possible 406(b)
11 attorney's fee. On February 28, 2005, this Court granted a stipulation to an Award of Attorney
12 Fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, whereby Defendant agreed to pay
13 Plaintiff's counsel \$5,000.00 as an attorney's fee. (docket # 33) Mr. Schiffman acknowledges
14 he "did receive a stipulated fee pursuant to the Equal Access to Justice Act (28 U.S.C. §2412)
15 of \$5,000.00," and represents that "whichever approved fee is less will be returned to Plaintiff
16 consistent with the provisions of 42 U.S.C. §406(b)(1) and 28 U.S.C. §2412."³ (docket # 42 at
17 2)

18 Plaintiff's counsel represents that the SSA failed to provide past-due benefits
19 information for quite some time, requiring Plaintiff's counsel to file a motion asking for an
20 order directing that this information be provided. The SSA subsequently provided the
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22 ² Parrish subsequently agreed to an amended fee agreement regarding the request for
23 review to the Appeals Council and for the appeal to the District Court. Each agreement
24 provided that if Parrish was found entitled to continuing disability benefits the fee would be
25 25% of all past due benefits payable to Parrish and his auxiliaries/dependents. A copy of
each of the agreements is appended to the subject Petition as Exhibit 1.

26 ³ "When EAJA fees are paid and there is also an award of attorney fees under 406(b), a
27 plaintiff's attorney must 'refun[d] to the claimant the amount of the smaller fee.' Act of
28 Aug. 5, 1985, Pub. L. 99-80, section 3, 99 Stat. 186; *Gisbrecht*, 535 U.S. at 796. There is thus
a dollar-for-dollar offset of any 406(b) fee by an EAJA award." (docket # 42 at 5)

1 information, which reflected that 25% of the past-due benefits payable to Plaintiff and his
2 auxiliaries totaled \$37,254.340. (*Id.*, Exh 2) Thereafter, Plaintiff's counsel promptly
3 submitted a petition for fee authorization to the SSA. On January 15, 2008 (the decision is
4 incorrectly dated 2007), the SSA established the fee for the administrative time expended by
5 counsel at \$21,500.00. Defendant has not challenged the accuracy of this information.

6 Plaintiff's counsel now seeks an award of attorney's fees equal to the amount
7 remaining after the Equal Access to Justice offset, i.e., \$15,754.30 (\$37,254.30 - \$21,500.00).

8 In the pending motion, Plaintiff's counsel states that he spent 34.5 hours on
9 this case. (docket # 42 at 9; Exh. 3) Counsel represents that he has practiced in the area of
10 Social Security Disability law since 1975. (*Id.* at 2) He has practiced law in Arizona "for more
11 than 32 years, is a certified specialist in workers' compensation, thereby reflecting his extensive
12 understanding of medical-legal issues, and is AV rated by Martindale-Hubbell." (*Id.*)
13 Plaintiff's attorney has represented in excess of 2000 claimants at all levels before the Social
14 Security Administration and has litigated many claims before the United States District Court
15 and the Ninth Circuit Court of Appeals." (*Id.* at 11) Counsel does not have an hourly rate for
16 Social Security cases because Social Security cases are only accepted on a contingency-fee
17 basis. Plaintiff's counsel's usual hourly rate for handling non-contingent fee workers'
18 compensation matters is \$250 per hour. A lawyers'-rate study, however, indicates that the
19 median hourly billing rate and ninth decile for an attorney with similar experience as Plaintiff's
20 counsel in the western region of the United States is \$ 280.00 per hour and \$422.00 per hour,
21 respectively. (*Id.*, Exh. 4, Altman & Weil, *Small Firm Economic Survey* (2006) at 52). Mr.
22 Schiffman has also conducted presentations in the area of Social Security Disability law before
23 groups such as the National Organization of Social Security Claimants' Representatives and
24 Arizona Trial Lawyers Association. (*Id.* at 2)

25 The requested 406(b) fee (\$15,754.30) translates into an effective hourly rate
26 of \$456.65 per hour; the total attorney's fees (\$37,254.30), however, equate to an effective
27 hourly rate of \$1079.83 per hour. Taking into account the EAJA offset, counsel seeks an
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1 effective hourly rate of \$934.91⁴ ($\$37,254.30 - \$5000.00 \div 34.5 \text{ hours} = \934.91) While these
 2 hourly rates appear excessive if taken in a vacuum, claimants' counsel encounter considerable
 3 risk of receiving nothing in a high percentage of these types of cases for their time and expertise
 4 by accepting Social Security disability clients on a contingency-fee basis.

5 As Plaintiff's counsel clearly demonstrates, civil actions for Social Security
 6 disability benefits have a significant risk of failure. The Social Security Administration keeps
 7 statistics for civil litigation for benefits. Those statistics are found in various places, including
 8 in the reports of the Congressionally created Social Security Advisory Board (SSAB), available
 9 at [http:// www.ssab.gov/reports.html](http://www.ssab.gov/reports.html). (docket # 42 at 9) In Fiscal Year 2000, federal courts
 10 found plaintiffs entitled to benefits in only 6% of Social Security Disability cases and remanded
 11 nearly one-half (48%) of the cases for further proceedings. (*Id.*, SSAB, Disability Decision
 12 Making: Data And Materials (Jan 2001), at 86, available at [http://www.ssab.gov/chartbookB.](http://www.ssab.gov/chartbookB.pdf)
 13 pdf) On remand, about 40% of these claimants are denied benefits. (*Id.*) Therefore, claimants
 14 who elect to go to district court ultimately prevail only 35% ($6\% + (48\% \times 60\%)$) of the time.
 15 *Id.*

16 **APPLICABLE LAW AND ANALYSIS**

17 Title 42 U.S.C. § 406(b) provides that “[W]henever a court renders a judgement
 18 favorable to a claimant under this subchapter who was represented before the court by an
 19 attorney, the court may determine and allow as part of its judgement a reasonable fee for such
 20 representation, not to exceed 25 percent of the total of the past-due benefits to which claimant
 21 is entitled.” The attorney's fees are payable from funds withheld from a claimant's past-due
 22 disability benefits by the Social Security Administration for work performed by claimant's
 23 counsel before the district court. In *Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002), the
 24 Supreme Court held that § 406(b) “does not displace contingent-fee agreements as the primary
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26 ⁴ The calculation to determine effective hourly rate is the total fee requested divided by
 27 hours spent on the case. *Roark v. Barnhardt*, 221 F.Supp. 2d 1020 (W.D. Mo. 2002) (where fee
 28 requested was \$6,576.00, but the court used \$9,147.50, the total fee requested including EAJA
 awards already granted, to calculate effective hourly rate).

1 means by which fees are set for successfully representing Social Security benefits claimants in
2 court. Rather, § 406(b) calls for court review of such arrangements . . . to assure that they yield
3 reasonable results in particular cases.” *Id.* at 807. So long as the contingency fee does not
4 exceed 25% of the past-due benefits, “the attorney for the successful claimant must [merely]
5 show that the fee sought is reasonable for the services rendered.” *Id.*

6 In determining whether fees sought under § 406(b) are reasonable, the court
7 considers the character of the attorney’s representation and the results achieved. *Id.* at 808. The
8 court may also consider whether Plaintiff’s counsel is responsible for delay, so as to prevent the
9 attorney from profiting from accumulating benefits while the case is pending in court, or, the
10 Court may adjust attorney’s fees when the “benefits are large in comparison to the amount of
11 time counsel spent on the case” *Id.* In determining the reasonableness of attorney’s fees,
12 the Court may also consider the number of hours spent representing the claimant and the
13 lawyer’s normal hourly billing rate for non-contingent-fee cases. *Id.*

14 “Since *Gisbrecht* . . . the district courts have been deferential to the terms of
15 contingency fee contracts in § 406(b) cases, accepting that the resulting de facto hourly rates
16 may exceed those for non contingency-fee arrangements.” *Hearn v. Barnhart*, 262 F.Supp. 2d
17 1033, 1037 (N.D. Cal. 2003). Courts have approved attorney’s fee awards under § 406(b) up
18 to an effective hourly rate of \$1,433.00. *Yarnevic v. Apfel*, 359 F.Supp. 2d 1363, 1365 (N.D.
19 Ga. 2005) (discussing effective hourly rates in social security cases); *Grunseich v. Barnhart*,
20 439 F.Supp.2d 1032, 1035 (C.D. Cal. 2006) (approving attorney’s fees of \$600.00 per hour);
21 *contra, Hodges-Williams v. Barnhart*, 400 F.Supp.2d 1093, 1099 (D. Ill. 2005) (contingency
22 fee award which “would amount to an hourly rate of more than \$1,000 per hour” is
23 unreasonable).

24 This Court finds counsel’s requested attorney’s fees in the total amount of
25 \$37,254.30 for 34.5 hours of work, which calculates to an overall effective rate of \$1079.83 per
26 hour, are reasonable in light of the legal standards set forth in *Gisbrecht* and the facts of this
27 case. When Mr. Schiffman accepted Plaintiff’s case, he faced a substantial risk of failure. This
28 is reflected in the fact that the case had already been denied at the hearing level twice and once

1 Arizona Trial Lawyers Association. (*Id.* at 2) Mindful of the cost-of-living increase (for
2 example, the price of gasoline is at an all-time record high in Arizona (\$3.25 per gallon) and
3 a barrel of oil is also at a record high (over \$100.00 per barrel)), and the significant length of
4 time Plaintiff's counsel has waited to be fairly paid for his successful work, the Court
5 concludes the requested attorney's fees are reasonable under *Gisbrecht*. Nothing in the
6 record suggests that the Plaintiff's attorney's fees should be reduced.

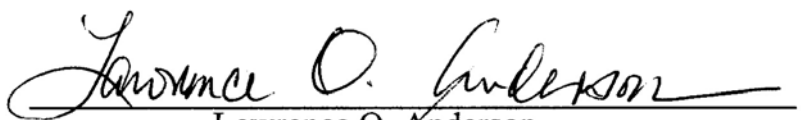
7 Accordingly,

8 **IT IS HEREBY ORDERED** that Plaintiff's Petition for Approval of
9 Attorneys' Fees under 42 U.S.C. § 406(b), docket # 42, is **GRANTED** in the amount of
10 \$15,754.30 and shall be promptly paid out of the monies withheld by the Commissioner
11 from Plaintiff's benefits.

12 **IT IS FURTHER ORDERED** that all monies, if any, remaining after
13 payment of Plaintiff's attorney's fees in accordance with this Order that were withheld for
14 payment of attorney's fees shall be promptly refunded directly to Plaintiff.

15 **IT IS FURTHER ORDERED** that attorney Alan M. Schiffman shall
16 promptly reimburse Plaintiff the amount of \$5,000.00 previously paid by the Government
17 under the EAJA.

18 Dated this 8th day of April, 2008.

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22 Lawrence O. Anderson
23 United States Magistrate Judge
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